

CHAPTER 69-02-09
PROCEDURES FOR PROTECTING INFORMATION FROM DISCLOSURE

Section	
69-02-09-01	Application to Protect Information
69-02-09-02	Filing of Application
69-02-09-03	Processing the Application
69-02-09-04	Protective Order
69-02-09-05	Request for Hearing - Who May Request - Time - Burden of Proof
69-02-09-06	Request for Hearing - Contents
69-02-09-07	Viewing Protected Information
69-02-09-08	References to Protected Material at Hearings
69-02-09-09	Protection of Protected Information
69-02-09-10	Copies of Information Used During Hearing
69-02-09-11	Documents Certified on Appeal
69-02-09-12	Disposal of Protected Information
69-02-09-13	Information Filed Under Sections 69-09-05-12 and 69-09-05-12.1

69-02-09-01. Application to protect information. Except as provided in section 69-02-09-13, an applicant requesting protection of information in an administrative proceeding or in a response to a commission request for information shall file an application with the commission. The application must include at least the following:

1. A general description of the nature of the information sought to be protected.
2. The specific law or rule on which protection is based.
3. If the basis for protection is that the information is trade secret:
 - a. An explanation of why the information derives independent economic value, actual or potential, from not being generally known to other persons;
 - b. An explanation of why the information is not readily ascertainable by proper means by other persons;
 - c. A general description of the persons or entities that would obtain economic value from disclosure or use of the information;
 - d. A specific description of known competitors and competitors' goods and services that are pertinent to the tariff or rate filing; and
 - e. A description of the efforts used to maintain the secrecy of the information.

4. If the basis for protection is a reason other than that the information is trade secret, the specific basis or bases upon which the information qualifies for protection.
5. A redacted public version of the information, unless this requirement is waived by the commission. The amount redacted must be as minimal as possible. If it is not possible to file a redacted public version, a specific written request for waiver of the requirement and the reasons for requesting a waiver must be filed.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-02. Filing of application. The application must be addressed to and filed with the executive secretary of the commission. The protected material filed with the application must be separately bound and placed in a sealed envelope, or other appropriate, sealed container, which must be labeled: **PROTECTED INFORMATION - PRIVATE**. An original and seven copies of the public portion of the application must be filed unless this requirement is waived by the commission. Only one copy of the protected material may be filed.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-03. Processing the application. When an application for protection of information is filed, the commission staff shall examine the information and application, and file and serve a response that includes a recommendation on whether the information qualifies for protection. If the basis for requesting protection is that the information is trade secret, the staff response must include a recommendation on whether the information is relevant and is trade secret, under the definition of trade secret in North Dakota Century Code section 47-25.1-01. The commission will make a determination on the application from the application, the recommendation, and any response received from those served.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-04. Protective order. Upon a determination that information qualifies for protection, the commission shall issue a protective order limiting disclosure.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-05. Request for hearing - Who may request - Time - Burden of proof.

1. Upon a determination that the information does not qualify for protection, the applicant will be notified and has seven days to request a hearing before the commission, or obtain appropriate injunctive relief from the courts. If no hearing is requested or the commission is not otherwise restrained, the information will become part of the public record without protection. The burden of proof in such a hearing is on the party seeking to prevent disclosure.
2. If any person disagrees with the designation of information as protected or with its nondisclosure, the person shall first attempt to informally dispose of the dispute with the party seeking to prevent disclosure. If the dispute cannot be resolved, any person may request a hearing before the commission to determine the protected status.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-06. Request for hearing - Contents. A request for hearing must be in writing. An original and seven copies of the request must be filed with the executive secretary of the commission. The request must identify the reason the information should be disclosed, or not protected. In any hearing the burden of proof is on the party seeking to prevent disclosure.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-07. Viewing protected information.

1. The commission and its staff, and any outside counsel retained by the commission, may view protected information filed with the commission at any time. However, the commission and its staff are bound by the terms of these rules to keep the information confidential and must execute the protective agreement as required in subsection 3. The originator (applicant for protected status) may view the information at any time without the necessity of executing the protective agreement required in subsection 3.
2. Others who wish to view protected information, including experts who are not regular full-time employees of the commission, and opposing counsel and experts, may do so only after authorization from the commission. The commission may grant authorization when the person wishing to view the information submits a written request that includes all of the following:

- a. The name and address of the person who will view the information;
- b. Identification, as specifically as possible, of the information requested;
- c. A showing of good cause why the information is needed;
- d. Identification of the purpose of the review;
- e. Identification of the intended use of the information; and
- f. An estimate of the time needed for review.

The requesting person shall file the original written request with the commission and serve it upon the originator at least ten days prior to the time the person desires to view the information unless the originator agrees to a shorter notice period.

- 3. Any person reviewing protected information filed with the commission shall execute a protective agreement form provided by the commission. A new protective agreement form must be executed for each work day in which information is viewed.
- 4. The commission shall disclose the information unless:
 - a. The commission is prohibited by law from disclosure under any circumstances; or
 - b. The originator shows good cause why disclosure should not be granted.

When disclosed, protected information may not be removed from commission offices and must be returned for secure filing prior to the end of the workday on which the information was disclosed, and may be used only for purposes of the proceeding or case.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-08. References to protected information at hearings. To the extent that reference is made to any protected information by a person afforded access to such information during any aspect of the proceeding, the information should be referenced only by its title or its exhibit identification, or in a manner that does not unnecessarily disclose the confidential information. If specific disclosure of the confidential information is necessary during oral testimony or argument, it

must be on such prior notice as is feasible and, in any event, on sufficient notice to clear the hearing room of persons not bound by this chapter.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-09. Protection of protected information. Any part of the record of a proceeding containing protected information, including exhibits and transcript pages, must be protected unless otherwise ordered by the commission. If a commission order requires a finding based on protected information, the order must reference the confidential nature of the finding and a separate, confidential document must be prepared to state fully the finding of fact and the protected information relied upon to support the finding.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-10. Copies of information used during hearing. Copies of the protected information may be made for use during a hearing for persons bound by these rules. If copies are made for hearing purposes, they must be numbered. Upon the completion of the hearing, all copies of the information must be returned to the disclosing party or commission staff.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-11. Documents certified on appeal. When an order of the commission is appealed and the documents are certified to court, copies must be made of the protected information. The copies of protected information must be placed in a sealed envelope, or other appropriate, sealed container, and labeled: "**PROTECTED INFORMATION - PRIVATE**". The originals of the protected information must be retained in the commission's protected information file. When the court issues its decision and returns the case record to the commission, the copies of protected information must be filed with the originals in the commission's protected information file.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-12. Disposal of protected information. Except for information filed under section 69-02-09-13, when a case or file containing protected

information has been closed for one year the commission will dispose the protected information by shredding.

History: Effective January 1, 2001; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

69-02-09-13. Information filed under sections 69-09-05-12 and 69-09-05-12.1. Information filed to comply with subdivision b of subsection 3 of section 69-09-05-12 or section 69-09-05-12.1 is protected without need for the originator to file an application and without further action by the commission, unless the commission orders otherwise. Sections 69-02-09-01 through 69-02-09-04 do not apply to information filed to comply with subdivision b of subsection 3 of section 69-09-05-12, or subsections 1, 2, or 3 of section 69-09-05-12.1.

History: Effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1